No. 85-1648

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Supreme Court, U.S.
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CALIFORNIA HOSPITAL ASSOCIATION, a non-profit California corporation; CALIFORNIA RESTAURANT ASSOCIATION, a non-profit California corporation; CALIFORNIA MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA CHAMBER OF COMMERCE, a non-profit California corporation; MERCHANTS AND MANUFACTURERS ASSOCIATION, a non-profit California corporation; CALIFORNIA HOTEL AND MOTEL ASSOCIATION, a non-profit California corporation,

Petitioners,

v.

PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' COMBINED SUPPLEMENTAL AND REPLY BRIEF

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PATRICK W. HENNING, as Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California,

Respondent.

PETITIONERS' COMBINED
SUPPLEMENTAL AND REPLY BRIEF

INTRODUCTION

Pursuant to Rules 22.5 and 22.6 of this Court, Petitioners hereby respectfully submit their combined supplemental and reply brief.[1/] In the "supplemental" portion of this brief, Petitioners call to the Court's attention a new decision of the Fourth Circuit Court of Appeals, Holland v. National Steel Corp., No. 85-1707 (4th Cir. May 28, 1986), that was decided after the filing of the Petition herein. This new decision expressly rejects both the decision of the Ninth Circuit Court

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1/ For ease of reference and the convenience of the Court, Petitioners have combined their supplemental and reply briefs into one document. The "supplemental" portion of this brief is set forth at pages 1 through 12, and the "reply" portion of the brief is set forth at pages 13 through 26. In accordance with Rules 22.5, 22.6, and 33.3, Petitioners have kept well within the 20-page limitation separately applicable to each of the two portions of this combined brief. Finally, since Petitioners could not provide this brief with both a tan (supplemental brief) and yellow (reply brief) cover, see Rule 33, they have chosen a tan cover.

of Appeals in the instant case and the United States Department of Labor (hereinafter "DOL") regulation that formed the basis for the Ninth Circuit's decision.[2/] The Fourth Circuit noted that its decision in National Steel Corp. and the Sixth Circuit's decision in Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1985), are both in direct conflict with the Ninth Circuit's decision. In the "reply" portion of this brief, Petitioners respond to those arguments that are raised for the first time in the opposition and amicus curiae briefs filed by Respondent and the DOL.

2/ See 29 C.F.R. § 2510.3-1(b). The National Steel Corp. decision is reproduced as Appendix L to this combined supplemental and reply brief. (Appendices A through J were submitted with the Petition and Appendix K was submitted with Respondent's opposition brief.)

ARGUMENT

I.

THE DIRECT CONFLICT BETWEEN THE NINTH AND OTHER CIRCUITS IS SPECIFICALLY ADDRESSED AND CONFIRMED IN THE FOURTH CIRCUIT'S MAY 1986 DECISION IN HOLLAND v. NATIONAL STEEL CORP.

A. The Ninth Circuit's Decision Is In Direct Conflict With Recent Decisions Of The Fourth And Sixth Circuits, As Well As Decisions Of Other Courts

Petitioners have requested this Court to grant a writ of certiorari in this case due in part to the enormous national significance of the issues presented and the conflict that exists between the decision of the Ninth Circuit and those of other courts, including certain decisions of this Court. Among the cases that presented a direct conflict when the Petition was filed was the decision of the

Sixth Circuit in Blakeman v. Mead Containers, supra, the decision of the highest state court in Massachusetts in Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830 (1985), and two district court decisions, including the decision in Holland v. National Steel Corp., C.A. No. 83-0033-W(M) (N.D. W.Va. 1985).[3/]

The split in the circuits is clear and, since the filing of the Petition, has become even sharper. On May 28, 1986, the Fourth Circuit affirmed the district court decision in Holland v. National Steel Corp., Civ. No. 85-1707. The Fourth Circuit specifically rejected the DOL regulation and the Ninth Circuit's decision as unreasonable in light of the meaning of 29 U.S.C. § 1002(1), which the court found "quite plain."[4/] The court held

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3/ The Barry and National Steel Corp. cases are reproduced as Appendices J and I, respectively, of the Petition for Writ of Certiorari.

4/ The district court in this case and the Supreme Judicial Court of Massachusetts also agreed that the plain meaning of ERISA would extend its coverage to all funded and unfunded plans, funds, and programs that provide vacation pay.

that the definition of welfare plan set forth in the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. (hereinafter "ERISA"), covered the company's vacation and extended vacation benefits, which were "paid out of National's general funds." Slip Op. at p. 8, Appendix L at L12-L13 (emphasis added).

In addition to identifying the direct conflict that exists among the circuits, National Steel Corp. clearly rejects several contentions made by Respondent and the DOL in their briefs in opposition to the Petition. Respondent argues, for example, that the Sixth Circuit's decision in Blakeman and the Fourth Circuit's severance pay decision in Holland v. Burlington Industries, 772 F.2d 1140 (4th Cir. 1985), are entirely consistent with the Ninth Circuit's decision in this case. The Fourth Circuit flatly disagrees and construes the Sixth Circuit's decision to hold that all vacation plans are covered by ERISA even if paid from the employer's general funds. This

is in direct conflict with the position of the Ninth Circuit. Furthermore, the Fourth Circuit finds that its own decision in Holland v. Burlington Industries supports its recent conclusion that unfunded vacation programs are covered under ERISA. The Burlington Industries decision holds that unfunded severance pay plans are subject to ERISA. In National Steel Corp., the court simply extends its rationale to hold that ERISA covers unfunded vacation plans as well as unfunded severance pay plans. In short, the Fourth Circuit agrees with the DOL regulations insofar as they provide that ERISA covers unfunded severance pay programs, but rejects the section in the regulations that excludes unfunded vacation programs from ERISA.

Consequently, it is clear that a sharp conflict exists between the Ninth Circuit on the one hand and the decisions of the Sixth and Fourth Circuits on the other. Moreover, the Supreme Judicial Court of Massachusetts in Barry and the federal district court in

Louisiana in James v. T.G. & Y. Stores Co., No. 85-0113 (W.D. La. 1985), have reached the same conclusions as the Fourth and Sixth Circuits. Thus, five courts, including three circuits, have addressed this issue in the past 15 months. Not only does a clear split exist, the Ninth Circuit stands completely alone in concluding that the source from which vacation pay benefits are provided controls the outcome of the ERISA coverage issue. All of the other four courts have properly concluded that ERISA's plain language covers every plan, fund or program that provides vacation pay benefits, regardless of whether those benefits are paid from an employer's general assets or a separate fund.

B. The Fourth Circuit Has Agreed With Petitioners' Contention That The Sixth Circuit's Decision In Blakeman v. Mead Containers Conflicts With The Ninth Circuit's Holding In This Case

Respondent and the DOL did not have the benefit of the National Steel Corp. decision when they filed their opposition briefs. Accordingly, they questioned the significance of the Sixth Circuit's decision in Blakeman, which concluded that the employer's unfunded vacation plan was covered by ERISA and that the state laws governing the vacation claim were therefore preempted. The National Steel Corp. decision demonstrates that Petitioners were fully correct in their interpretation of Blakeman.

Respondent argued that, because the parties in Blakeman had conceded the issue of ERISA coverage, the Sixth Circuit failed to

address this critical jurisdictional issue.[5/] However, Respondent and the DOL overlooked the fact that the Sixth Circuit clearly focused on the jurisdictional issue. The Sixth Circuit was also aware that a decision that unfunded vacation plans are covered by ERISA would conflict with the Ninth Circuit's decision in this case, as well as the DOL regulation. In fact, the Sixth Circuit cited the Ninth

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5/ The vacation pay claim in Blakeman sought vacation pay for 1984. It is clear that the claim was for what Respondent calls "ordinary vacation pay" and what the DOL considers "wages" pursuant to a "mere payroll practice." The employer's informal vacation policy did not involve a separate fund or trust. This was confirmed by the defendant/appellee's counsel in Blakeman. Indeed, the vacation policy in issue was set forth in informal guidelines that simply provided: "Salaried employees who have completed the necessary length of service requirements and who are in the employment of the company as of close of business on December 31 will become entitled on that date to vacation time allowance with pay . . . [for] the subsequent calendar year." Brief of Defendant-Appellee before the Sixth Circuit Court of Appeals at pp. 13-14 (emphasis added).

Circuit's decision immediately after concluding that there was "little doubt that . . . the severance pay and vacation provisions are 'employee welfare benefit plans' as defined in 29 U.S.C. § 1002(1)." 779 F.2d at 1149 & n. 2. The court cited the Ninth Circuit's decision in footnote 2 with a "But see" signal to demonstrate that the Ninth Circuit's holding directly contradicted the language in 29 U.S.C. § 1002(1), which the Sixth Circuit found dispositive of the ERISA coverage issue. Indeed, as explained above, the direct conflict between the Sixth and Ninth Circuits has been expressly recognized by the Fourth Circuit in the National Steel Corp. case.

C. The Fourth And Sixth Circuits Have Specifically Rejected The Erroneous Implications Respondent And The DOL Have Drawn From Prior Decisions Of Those Circuits

Respondent and the DOL have asserted that

the Ninth Circuit's decision is supported by the indirect implications of the Sixth Circuit's decision in Abella v. W.A. Foote Memorial Hospital, Inc., 740 F.2d 4 (6th Cir. 1984), which involved sick leave, and the Fourth Circuit's decision on severance pay in Holland v. Burlington Industries, supra. Significantly, however, neither of these cases addressed ERISA's coverage of vacation benefits provided from an employer's general assets. Furthermore, both the Fourth and Sixth Circuits have since had the opportunity to examine the precise DOL regulation at issue herein, the Ninth Circuit's decision, and the application of ERISA to vacation pay benefits provided from unfunded plans. Both circuits have since confirmed that ERISA does apply to such plans even where no separate fund or trust arrangement exits. Moreover, both circuits agreed with the district court's holding in this case that ERISA preempts state laws that relate to such vacation plans. Accordingly, the Sixth and Fourth Circuits

have directly dispelled the implications that Respondent and the DOL erroneously suggest should be drawn from their prior decisions in Abella and Burlington Industries. It is thus clear that the Ninth Circuit's reliance on Abella to conclude that unfunded vacation plans fall outside of ERISA's scope was misplaced.[6/]

6/ Interestingly, the DOL states that each employer can control its own fate by determining whether ERISA or state law will govern its vacation program. Despite the obfuscation regarding a purported "wage/benefit" distinction, the DOL concedes that "[i]t is true that an employer who creates a trust to pay vacation benefits and separately funds it in advance thereby establishes a plan governed by the federal statute, whereas an employer who merely continues to make ordinary wage payments from general assets while employees are on vacation remains subject to the state law." In fact, the DOL states that the employer's motivation is irrelevant and it can "choose," if it desires, "to avoid one or the other [state or federal] of the statutory schemes." DOL Brief in Opposition at p. 11.

Congress did not create the comprehensive scheme of federal regulation set forth in ERISA with the expectation that employers could manipulate coverage as the DOL suggests. Rather, broad coverage of all

II.

THE DOL REGULATION MUST BE DISREGARDED UNDER ANY STANDARD

Respondent and the DOL argue that the DOL's "payroll practice" regulation is entitled to great deference and must be upheld if deemed "reasonable." In making this argument, Respondent chastises Petitioners for acting "as if Congress had not granted [the DOL] rulemaking and definitional power in 29 U.S.C. § 1135, and instead had asked courts to construe ERISA's definitional sections

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6/ Continued

enumerated plans, funds, and programs was envisioned as a means of advancing the national interest in employee benefit plans by protecting such plans from a multiplicity of hastily contrived and conflicting laws devised by the states to deal with some aspect of employee benefit regulation.

de novo."[7/] Opposition Brief at p. 6. Petitioners respectfully submit that this Court does not require Congress' invitation or permission to construe the language of ERISA (or any other federal statute) de novo. Indeed, it would appear obvious that this type

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7/ 29 U.S.C. § 1135 contains a general and limited grant of interpretative rule-making authority to the DOL. It is designed primarily to assist the DOL to carry out its responsibilities in connection with the reporting and disclosure provisions of ERISA. Specifically, the statute permits the DOL to prescribe forms and bookkeeping procedures and to "define accounting, technical and trade terms." Here, Respondent and the DOL have placed themselves in the ridiculous posture of having to characterize "vacation benefits" as an "accounting," "technical" or "trade" term. Obviously, in granting the DOL authority to define esoteric and arcane terms, Congress did not intend to give the DOL carte blanche power to define statutory terms of common understanding, such as "vacation benefits," so as to narrow dramatically Congress' own definition of a "welfare plan." See 29 U.S.C. § 1002(1). Respondent and the DOL ask the Court to accord greater deference to the regulation than to the language of the statute that it purports to construe.

of statutory review is among the fundamental responsibilities of this Court.

Contrary to the arguments of Respondent and the DOL, the payroll practice regulation at issue herein is merely a statutory interpretation that this Court is completely free to reject. It is well settled that "the courts are the final authorities on issues of statutory construction . . . and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 at 745-746, 36 L.Ed.2d 620, 935 S.Ct. 1773 (1973) (emphasis added). Moreover, this Court has repeatedly stressed that "the starting point for interpreting a statute is the language of the statute itself," and that "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Con-

sumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 at 108, 64 L.Ed.2d 766, 100 S.Ct. 2051 (1980).[8/] Here, this Court need only read the clear and unambiguous words of the statute to understand the scope of 29 U.S.C. § 1002(1) and to conclude that the state laws at issue in this case are pre-empted.[9/]

Quite simply, one does not require the interpretative guidance of an employee benefits expert or the DOL to understand the term "vacation benefits." Furthermore, the Ninth

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8/ This Court recently applied these principles of statutory construction in construing ERISA's language in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 at 97, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983). In that case, the Court stated: "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning" (emphasis added).

9/ The DOL's regulation can be summarily dismissed under the authority of United States v. Vogel Fertilizer Co., 455 U.S. 16, 70 L.Ed.2d 792, 102 S.Ct. 821 (1982), and Rowan Companies v. United States, 452 U.S. 247, 68 L.Ed.2d 814, 101 S.Ct. 7288 (1981).

Circuit's assertion that the DOL's interpretation is reasonable because the term does not have an "immutable" meaning simply evades the correct inquiry, namely, whether the term has a plain meaning within the statutory context.[10/] The four courts other than the Ninth Circuit that have recently examined this precise issue have uniformly concluded that the language used by Congress is quite plain and extends to vacation plans, funds and programs financed from an employer's general assets.

The legislative history of ERISA, as well as the statute itself, demonstrate the accuracy of this conclusion. They reveal an

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10/ Obviously, it is rare that any term will have an immutable (i.e., unchangeable) meaning. This does not mean, however, that mutable terms cannot have a plain meaning when used in a specific statutory context. The Ninth Circuit's suggestion to the contrary simply invites agencies such as the DOL to muddle the clear language of a statute with administrative "construction" and thereby thwart the intent of Congress.

unmistakable congressional concern to occupy the entire employee benefit field and remove every plan, fund or program that provides benefits identified in 29 U.S.C. § 1002(1) from potential state regulation. See Shaw v. Delta Air Lines, Inc., 77 L.Ed.2d at 506 & n. 25. Based on the unambiguous language in 29 U.S.C. § 1002(1) and this preeminent congressional purpose, it is clear that the DOL regulation not only conflicts with ERISA's plain language, but is also arbitrary, irrational, and an inappropriate exercise of the DOL's authority.

III.

THE "WAGE/BENEFIT" AND "OCCASION-CIRCUMSTANCES-SOURCE" JUSTIFICATIONS FOR THE DOL REGULATION ARE ANALYTICALLY HOLLOW AND ENTIRELY WITHOUT MERIT

Respondent, the DOL, and the Ninth Circuit have all attempted to justify the DOL's payroll practice regulation based on "wage/

benefit" and "occasion-circumstances-source" theories. The "wage/benefit" thec is that Congress intended ERISA to regulate the payment of employee benefits and not the payment of wages during "ordinary vacations."[11/] It is clear, however, that this "wage/benefit" theory of ERISA coverage is analytically meaningless. Throughout the country, states such as California have hastened to assert regulatory authority over employee benefit

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11/ Petitioners are somewhat mystified by Respondent's talismanic use of the term "ordinary vacations" in his opposition brief. Respondent appears to argue that the term "ordinary vacations" has a commonly understood meaning that somehow places the vast majority of this nation's vacation plans beyond the range of ERISA regulation. There is nothing in ERISA's legislative history to suggest that Congress intended the Act to cover only an "extraordinary vacation." Moreover, based on Respondent's own definition, state laws regulating "ordinary vacations" were found preempted by the Sixth Circuit in Blakeman, supra, by the Fourth Circuit in National Steel Corp., supra, and by the Supreme Judicial Court of Massachusetts in Barry, supra.

plans under the guise of "wage" regulation.[12/] Moreover, it is difficult to fathom how the payment of vacation benefits from an employer's general assets is any less a "benefit" under the "wage/benefit analysis" than the payment of the same benefits from a trust. The payment serves the same purpose, is triggered by the same event, is paid in the same amount, and is subject to the same tax consequences. Quite simply, the "wage/benefit" distinction is a semantic shell game

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12/ See footnote 21 of the Petition for Writ of Certiorari. Petitioners must confess their bemusement at Respondent's assertion that "[t]he unpredictable and highly contingent nature of severance pay . . . is reflected in common speech which never confuses it with wages." Opposition Brief at 12, footnote 12. Respondent has not always construed the term "severance benefits" with such clarity. Indeed, one of the Petitioners recently succeeded in enjoining Respondent from enforcing the California severance pay laws. In that case, Respondent argued that severance pay was simply another form of "wages" and therefore was subject to state law regulation. See California Chamber of Commerce v. Simpson, 601 F.Supp. 104 (C.D. Cal. 1985).

that is utterly useless in interpreting the scope of ERISA's coverage.

The "occasion-circumstances-source" theory of ERISA coverage is equally hollow. This so-called "three-part test" purportedly delimits ERISA's scope "in terms of the occasion for payment, the circumstances in which it was made, and the source." Opposition Brief at 8; 770 F.2d at 860; App. B at B-8. It is patently clear, however, that the only prong in this "test" that has any substance is the third prong, which focuses simply on the "source" of payment of the benefits. The "occasion" and "circumstances" in which vacation benefit payments are provided are both the same whether those benefits are paid from a separate fund or an employer's general assets. Nevertheless, under the DOL's regulation, only the trust-funded benefits are covered by ERISA and only because they are paid from a source other than the employer's general assets.

In reality, the "occasion-circumstances-source" theory of ERISA coverage is nothing

more than a sterile rationale for the DOL's conflicting treatment of severance and vacation benefits. Since the DOL does not require severance benefits to be paid from a trust in order to be covered under ERISA, it is necessary to provide some justification for imposing such a requirement on vacation benefits. This in turn necessitates distinguishing severance benefits from vacation benefits. Since severance benefits are always paid at termination and vacation benefits are normally paid during employment,[13/] the "occasion" and "circumstances" for payment of these two types of benefits differ. Thus, the DOL's conflicting treatment of general asset severance benefits and general asset vacation benefits is purportedly justified on the theory that the "source" of payment is not the only

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13/ Coincidentally, the state laws at issue in this case directly regulate only vacation benefit obligations that become payable at termination.

relevant factor; one must also consider the "occasion" and "circumstances" of payment.

The "occasion-circumstances-source" theory is predicated on the presumption that Congress had a two-fold intent in extending ERISA's coverage to welfare plans. First, Congress desired to prevent trust fund abuse. Second, Congress wished to protect employees against benefit defaults. Obviously, ERISA coverage of general asset plans of any kind, whether severance pay or vacation plans, is completely unnecessary to further Congress' intent to curb trust fund abuse. Accordingly, it would appear logical for the DOL to exclude both general asset severance and vacation plans from ERISA's scope if the concern for "abuse" had been the sole factor. The DOL excludes only general asset vacation plans, however, based apparently on the position that there is a greater likelihood of default with respect to severance benefits than vacation benefits. Therefore, the DOL contends that coverage of unfunded severance pay plans is

consistent with Congress' second purpose in extending ERISA to welfare plans.

In short, the "occasion-circumstances-source" theory of ERISA coverage is just a convoluted way of saying that ERISA coverage of unfunded severance plans is justified because there is a greater risk of default with respect to severance benefits than exists with respect to vacation benefits. As noted in footnote 11 in the Petition for Writ of Certiorari, however, this "fear-of-default" rationalization falls apart in the context of this case. First, the DOL's purported assumption that a greater fear of default arises in connection with unfunded severance pay programs is not corroborated by ERISA or its legislative history. In addition, California's requirement that vacation benefits be prorated upon termination creates a greater potential for default in connection with large employee layoffs and plant sales or closings than exists with respect to severance benefits. The reason is clear. Greater numbers

of employees are covered by vacation plans than severance pay plans. Moreover, the contingencies that trigger severance pay liabilities, e.g., layoffs or separations from employment, represent only some of the contingencies that engender vacation pay liabilities. It is thus plain that the analytical justification for the "occasion-circumstances-source" theory of ERISA coverage simply does not apply in the context of the state laws involved in this case.

Further, the three-pronged test relied on by Respondent and the DOL is completely meaningless when applied to vacation claims. It provides no basis whatsoever other than the existence of a fund to distinguish between unfunded vacation programs that the DOL asserts fall outside ERISA coverage and funded programs that it believes are covered. In short, the source of payment is the only real distinction used by the DOL to ascertain which vacation benefits are subject to ERISA and

which are not.[14] Given the absence of any minimum or advance funding requirement for welfare plans in ERISA, this is truly a distinction without a difference.[15]

14/ See note 6, supra.

15/ The DOL's suggestion that advance funding is a prerequisite to the existence of a trust under ERISA is inaccurate. ERISA carves out a specific exemption from its minimum and advance funding requirements for vacation and other welfare plans even where a trust is used. 29 U.S.C. § 1081(a)(1). Indeed, any "advance" funding that an employer voluntarily elects to make can be in whatever amount it chooses, such as a sum equal to what the employer expects to pay during the next week, month, or quarter. This certainly affords no greater source or security for the payment of benefits than does the employer's general assets.

The DOL also contends, quite erroneously, that an "independent" trustee will function as a watch dog to ensure that trust funds are collected and all benefits are paid. DOL's Opposition Brief at pp. 10-11. First, ERISA allows employers to appoint a member of their own staff to function as the trustee. 29 U.S.C. § 1103(c)(1). See, e.g., 26 C.F.R. § 1.501(c)(9)-1.502(c)(3) (trustee of a Voluntary Employee Beneficiary Association (VEBA) trust can be anyone where the VEBA provides vacation or other welfare benefits described in 29 U.S.C. § 1001(1)). Second, even if an "independent" Trustee is selected, the only assets over which the trustee will have

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

DATED: June 9, 1986

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5/ Continued

authority consist of those sums which the employer has elected to deposit in the trust. Again, there is no minimum or advance funding obligation and thus no authority for the trustee to insist that advance funding occur.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1707

Barbara G. Holland,

Appellant,

versus

National Steel Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. Robert E. Maxwell, Chief United States District Judge. (C/A 83-0033).

Argued: March 5, 1986

Decided: May 28, 1986

Before RUSSELL, SPROUSE and CHAPMAN, Circuit Judges.

W. Dean DeLaMater (DeLaMater, Hagg & Bohach on brief) for Appellant; Carl H. Hellerstedt, Jr. (Volk, Robertson, Frankovitch, Anetakis and Hellerstedt on brief) for Appellee.

SPROUSE, Circuit Judge:

Barbara Holland appeals from the district court's grant of summary judgement in favor of her former employer, National Steel Corporation (National). In her diversity action, Holland alleged that National Steel violated her employment contract and failed to pay wages and vacation benefits in accordance with West Virginia state law when it laid her off in 1982. The district court found that Holland's breach of contract claim failed to state a cause of action under West Virginia law, that the Employment Retirement Income Security Act, 29 U.S.C. 1001 et seq. (1982) (ERISA), preempted her claims with respect to the payment of vacation benefits and that her claim arising from the late payment of wages was moot. We affirm.

I.

National employed Holland as an hourly employee at its Weirton Steel Division beginning in 1965. Prior to October 1978, she was

a member of a collective bargaining unit in the Weirton Independent Steelworkers Union (ISU). In October 1978, National promoted her to foreman, a position outside of the collective bargaining unit. The collective bargaining agreement then in effect between National and the ISU provided that promotion to such a position would cause a break in the continuous service upon which an employee's seniority was based. If, however, the employee was later transferred back or demoted to a job in the bargaining unit, her seniority would be restored with full credit for her service in the exempt position.

Holland first expressed an interest in returning to an hourly position in 1980. National responded that she would have to wait until she was no longer needed in her current department. On August 1, 1980, a new collective bargaining agreement between National and ISU took effect which prohibited the return of a supervisor to hourly employment if hourly employees were laid off or if the reason for

the supervisor's return was the elimination of the supervisory position. The agreement also provided for an "open window" period in which upper level management could designate certain supervisors whom they would permit to return to the bargaining unit before October 1, 1980. After that date, supervisors would be able to return to the bargaining unit only if the contractual provisions were satisfied.[1/] In December 1980, having heard that she might be transferred to another salaried position, Holland informed National that she would prefer to return to her former hourly position rather than accept a transfer. A National superintendent informed her that he was not aware of any plan to transfer her.

1/ In July, 1980, National conducted a series of meetings with supervisory personnel to explain the agreement's provisions including the "open window." Holland does not recall attending any such meeting, and National, for the purposes of this appeal, concedes that she did not.

In February 1982, Holland learned that she could no longer return to an hourly position if any hourly employees were on layoff. In early March, National informed her that her last day of work would be March 6, 1982. As of that date, Holland was entitled to three weeks vacation and five days of salary for days actually worked. National required her to take her unused vacation beginning March 6, 1982 and erroneously allowed her an extra week of vacation. Accordingly, her separation became effective April 2, 1982.[2/] National paid her remaining salary and vacation wages in a check issued March 31, 1982, pursuant to its policy of paying salaried employees on the last day of the month. After April 2, 1982, Holland became eligible for benefits under National's

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2/ Holland argues that her layoff was March 6, 1982, the last day she actually worked. The district court found April 2, 1982 to be the layoff date.

Income Protection Plan, a program providing supplemental unemployment benefits.[3/]

National also had an extended vacation plan to provide two weeks of additional vacation to employees who had worked for the company for more than fifteen years. Under this plan, Holland was eligible for two weeks of additional vacation as of January 1, 1982. The plan also called for payment of unused extended vacation time to terminated employees. National, however, eliminated the entire program on March 8, 1982, prior to the effective date of Holland's layoff, and

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3/ At the time National informed Holland that she was to be laid off, it had in effect a policy allowing laid off employees the option of taking unused vacation pay as (1) time off prior to the effective date of the layoff or (2) a lump sum payment in lieu of time off. National did not give Holland the option of electing the latter, but required her to take her remaining vacation prior to her layoff. National asserts that it did not give her the option because its Income Protection Plan providing a supplement to state unemployment compensation benefits required exhaustion of vacation eligibility.

Holland received no payment for extended vacation benefits.

II.

Holland first maintains that the district court erred in granting National summary judgment on her claim that National violated her individual employment contract by not permitting her to return to the hourly ranks when National laid her off from her supervisory position in 1982. The gravamen of Holland's claim is that she and National entered into an employment contract which provided her the right to return to hourly employment and that National's subsequent collective bargaining agreement with the ISU did not alter her personal contract. The district court found, however, that the basis of her previous right to return to hourly employment was the 1977 collective bargaining agreement between ISU and National, and that the 1980 agreement subsequently eliminated that right. We agree with the district court

that this claim does not present an issue of material fact and that National was entitled to summary judgment on the claim.

III.

Holland next contends that National's failure to pay her any extended vacation benefits and its failure to pay her wages and regular vacation pay until March 31, 1982 violated West Virginia law. West Virginia requires employers to pay their employees at least every two weeks unless a special agreement provides otherwise. W. Va. Code § 21-5-3 (1985).[4/] In addition, employers

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4/ W. Va. Code § 21-5-3 provides in part:

> Every person, firm or corporation doing business in this State, except railroad companies as provided in section one [§ 21-5-1] of this article, shall settle with its employees at least once in every two weeks, unless otherwise provided by special agreement, and pay them the wages due, less authorized deductions and authorized wage assignments.

There was no such special agreement in effect during the relevant portion of Holland's employment with National.

must pay laid off workers any wages earned at the time of the layoff no later than the next regular payday or be subject to liquidated damages of up to thirty days wages in addition to the amount of wages due. W. Va. Code § 21-5-4(d), (e) (1985).[5/]

The state law contention which Holland raised related both to regular wages and

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5/ W. Va. Code §§ 21-5-4(d) and (e) state in part:

> (d) . . . when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.
>
> (e) If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default, until he is paid in full, without rendering any service therefor: Provided, however, that he shall cease to draw such wages thirty days after such default.

vacation pay. We first treat her vacation pay argument. She maintains that she was entitled to two weeks of extended vacation benefits for her fifteen years of service and to liquidated damages for National's failure to pay her regular vacation benefits until March 31, 1982. The district court held that ERISA preempted her claims for vacation benefits under state law because such benefits are part of an employee welfare benefit plan. 29 U.S.C. § 1144(a).[6/] ERISA provides in pertinent part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organi-

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6/ 29 U.S.C. § 1144(a) states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employer benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

> zation, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment, or vacation benefits . . . or (B) any benefit described in section 186(c) of this title. . . . 7/

29 U.S.C. § 1002(i). The United States Department of Labor, through its regulations, has interpreted this section to exempt from ERISA vacation benefits which employers provide out of their general assets as distinguished from vacation benefits paid from a dedicated fund. The regulations state:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include--
>
> . . . .
>
> (3) Payment of compensation, out of the employer's general

7/ 29 U.S.C. § 186(c) refers to, inter alia, "a trust fund established . . . for the purpose of pooled vacation, holiday, severance or similar benefits."

> assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example--
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons . . . .

29 C.F.R. § 2501.3-1(b). Holland asserts that this regulation exempts National's vacation plans from ERISA's preemptive effect, because the benefits are paid out of National's general funds. The meaning of 29 U.S.C. § 1002(1) is, however, quite plain and does not exempt National's vacation plans. As the district court concluded, the statute preempts Holland's state claims for both regular vacation and extended vacation benefits.

In reaching a contrary result, the Ninth Circuit Court of Appeals found the statutory language of section 1002(1) ambiguous and the Department of Labor regulation reasonable.

California Hospital Association v. Henning, 770 F.2d 856, 859 (9th Cir. 1985). We are, however, persuaded by the reasoning of the Sixth Circuit Court of Appeals which has held vacation plans to be "employee welfare benefit plans" as defined in 29 U.S.C. § 1002(1). Blakeman v. Mead Containers, 779 F.2d 1146, 1149 (6th Cir. 1985). Blakeman is, in our view, consistent with our holdings in Powell v. Chesapeake and Potomac Telephone Co. of Virginia, 780 F.2d 419, 421-22 (4th Cir. 1985) and Holland v. Burlington Industries, 772 F.2d 1140, 1146-47 (4th Cir. 1985). These cases recognize that ERISA's preemption clause, 29 U.S.C. § 1144(a),

> effectuates a broad remedial policy to protect the interests of participants in ERISA-governed plans and their beneficiaries 'by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.'

Powell, 780 F.2d at 421 (citation omitted).

Holland also contends that she is entitled to liquidated damages for National's failure to pay her final earned wages until March 31, 1982, twenty days after they were due under the scheme of sections 21-5-3 and 21-5-4 of the West Virginia Code. Section 21-5-4(e) provides for liquidated damages to a laid off employee when the employer fails to pay wages earned at the time of a layoff by the next regular payday. At the heart of this claim is Holland's insistence that she was laid off effective March 6, and thus any wages due her had to have been paid by March 11, 1982, her next regular payday under section 21-5-3. The district court determined that she was laid off effective April 2, 1982, and we agree with this determination. Holland, therefore, is not entitled to liquidated damages under section 21-5-4(e) because National paid her three days before April 2,

1982, the effective date of her layoff.[8/] Since liquidated damages are not available, and Holland on March 31, 1982 received all wages due her, the district court properly granted summary judgment in favor of National.

In view of the above, the judgment of the district court is affirmed.

AFFIRMED.

8/ There is, in our view, no question that National committed at least a technical violation of section 21-5-3 by not paying Holland every two weeks pursuant to that section. The liquidated damage section, section 21-5-4(e), however, applies only to section 21-5-4, and, as we have determined, Holland is not entitled to damages under that section. Because on March 31, 1982, National paid her the five days of regular wages which she earned in early March, we find that the violation of section 21-5-3 alone does not provide a basis for awarding her damages.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles. I am over the age of eighteen years and not a party to the within action. My business address is One Wilshire Boulevard, Suite 2100, Los Angeles, California, 90017. On this date, April 7, 1986, I served the within COMBINED SUPPLEMENTAL AND REPLY BRIEF in the matter styled "California Hospital Association, et al. v. Patrick W. Henning" in the United States Supreme Court, October Term, 1985, on all other parties to said action by placing 3 true copies thereof enclosed in a sealed envelope with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

John M. Rea, Esq.,
Attorney for the Labor Commissioner
525 Golden Gate Avenue
Suite 606
San Francisco, CA 94102

Charles Fried, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on June 10, 1986 at Los Angeles, California.

CATHERINE BELLOMO
Catherine Bellomo